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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMIEN ERIC JORDAN et al.,

Defendants and Appellants.

B278423

(Los Angeles County
Super. Ct. No. MA066171)

APPEALS from judgments of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed in part, reversed in part, vacated in part, and remanded with directions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Damien Eric Jordan.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant Charles Edward Lee.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Damien Eric Jordan (Jordan) and Charles Edward Lee (Lee) (collectively appellants) of kidnapping to rob and of robbery. At their trial, the prosecutor recounted in his closing argument how the victim described being forced to place his cell phone and other possessions on the roof of his kidnapper's car, being ordered to empty his pockets, and having his wallet and lighters taken at gunpoint by appellants. However, no evidence of the recited event is in the trial record.

While an attorney's statements are not evidence and innocent misrecollections are not uncommon, this false evidence was so convincing and so prejudicial that reversal is warranted as to Jordan and Lee's kidnapping for robbery and robbery convictions. Because there was insufficient evidence to support Jordan's convictions for robbery and for kidnapping for robbery, retrial is barred as to these counts, as to Jordan. Accordingly, we reverse Jordan's conviction for robbery and reduce his conviction for kidnapping to commit robbery to simple kidnapping and vacate his sentence. As to Lee, we reverse his convictions for kidnapping to commit robbery and for robbery, permitting retrial on these counts as to Lee only.

FACTUAL AND PROCEDURAL BACKGROUND

I. Allen Carll's testimony

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on May 25, 2015, Allen Carll was homeless and slept in an abandoned apartment building. Early that morning, Carll received on his cell phone a call from Lee, whom Carll knew as C.J. Lee told Carll to come to a restaurant located at or near "J and Sierra." When he got the call, Carll was coming down

from the methamphetamine he had smoked on the afternoon of the 24th.

Carll walked to the restaurant carrying his cell phone, his green and brown wallet that contained his driver license, some lighters and 65 cents. The wallet was in his pocket. Carll identified People's exhibit No. 9 as his wallet.

When Carll arrived at the restaurant, Lee was there with a person whom Carll did not know. Lee told Carll to put his cell phone in Lee's BMW and if Carll did not, Lee was going to knock him out. Lee also told Carll that there was a gun in the car. Carll believed Lee and was afraid for his life. Carll therefore put his cell phone and sweater in the car because Carll believed that if he did not, he would get hurt. Carll never testified where in the car he placed his cell phone or sweater.

After Carll put his cell phone in the car, and some 10 to 15 minutes after Carll arrived, another guy Carll did not know but learned was called "Blood Face" rode up on a red BMX bike. At trial, Carll identified Blood Face as appellant Jordan. Jordan immediately threatened Carll, "saying [Carll] said some shit about [Jordan]" and if Carll did not tell Jordan the truth, Jordan was going to knock him out. Carll had no idea what Jordan was talking about but Carll took him seriously.

Lee told Carll to get in the car. Fearing for his life, Carll got in the car and sat in the back. Immediately thereafter, Jordan entered the car and sat in the driver's seat while Lee stayed outside. Jordan then retrieved from underneath the driver's seat a black gun. Jordan threatened Carll with the gun, pointing it at him and unsuccessfully tried to cock it. Carll tried to get out of the car but Lee prevented Carll from exiting. Lee then drove away with Jordan in the front passenger seat and

Carll in the back. Jordan had the gun on his lap. Afraid, Carll did not try to get out of the car. Jordan called Carll a snitch, and Lee or Jordan told Carll they were going to kill him once they got past Avenue B. The area north of Avenue B was desert.

When they drove past a sheriff's station, Carll jumped out of the car. Although injured as a result of jumping out, he made it to the station.

II. Recovery of a wallet and appellants' arrests

Later that day, Los Angeles County Sheriff's Deputy Steve Owen found Lee's BMW outside a house on Avenue J-12. When Owen first spotted the vehicle, he saw Lee walking away from the car and Sarah Adams exit it. Lee and Adams then entered a house on West Avenue J-12.

When Owen returned to the house later that evening with other deputies, they heard noises that sounded like someone trying to escape. Deputies searched the house, but neither Lee nor Adams was in the house. Owen did not search the attic at that time.

The next day, Owen searched the attic and found, inter alia, an olive green wallet containing Lee's identification and his EBT card. Owen also found a black cell phone and a white cell phone in the attic.

Adams gave a recorded statement to detectives in which she said that, on May 25, 2015, she and Lee went to a house on Avenue J-10. When Lee saw deputies, he said, " 'Oh fuck. I'm going to be arrested.' " Lee went into the house's attic. Lee told Adams he had kidnapped someone. Lee had a black semiautomatic gun, but Adams thought it was a fake.

Deputies arrested Jordan about a week later at a residence, where they also found a red BMX-style bicycle being painted purple. Jordan admitted that his moniker was Blood Face.

III. Trial and sentence

Jordan and Lee were convicted by jury of the following charges: kidnapping to commit robbery (Pen. Code,¹ § 209, subd. (b)(1); count 1), second degree robbery (§ 211; count 2), and assault with a semiautomatic firearm (§ 245, subd. (b); count 3) with, as to Jordan, a firearm use finding (§ 12022.53, subd. (b)) on counts 1 and 2, and a firearm use finding (§ 12022.5, subds. (a) & (d)) on count 3.²

At sentencing, Jordan admitted that he suffered a prior strike (§ 667, subd. (d)) and a prior serious felony conviction (§ 667, subd. (a)). As to count 1, the court sentenced Jordan to prison for seven years to life doubled to 14 years based upon his strike admission, plus 10 years for the firearm use enhancement, plus five years for the serious felony enhancement, for a total term of 29 years to life. The court imposed and stayed, pursuant to section 654, a 20-year term as to count 2 and a 28-year term as to count 3.

Lee admitted he suffered two strikes (§ 667, subd. (d)), a prior serious felony conviction (§ 667, subd. (a)) and two prior felony convictions for which he served separate prison terms (§ 667.5, subd. (b)). On count 1, the court sentenced Lee to prison for a term of 25 years to life based upon the two strikes plus five

¹ All statutory references are to the Penal Code unless otherwise indicated.

² The jury found the gang enhancements not true.

years for the prior serious felony enhancement, for a total term of 30 years to life. As to counts 2 and 3, similar terms of 30 years to life were imposed and stayed pursuant to section 654.

ISSUES

Jordan and Lee claim error as to counts 1 and 2 only. They jointly argue that: (1) there is insufficient evidence to support their convictions on counts 1 and 2; (2) the prosecutor committed misconduct by arguing to the jury facts not in evidence and posing an improper hypothetical question to a gang expert³; (3) the court abused its discretion by denying their bifurcation motion regarding the gang allegations; (4) the trial court erroneously refused to exclude evidence of Jordan's gang moniker; and (5) cumulative error denied appellants a fair trial. In supplemental briefs, Jordan and Lee claim the matter must be remanded so they can benefit from recently enacted legislation, Senate Bills Nos. 620 and 1393.

DISCUSSION

I. Sufficient evidence supports Lee's convictions but not Jordan's convictions on counts 1 and 2

A. *Sufficient evidence supports Lee's convictions on counts 1 and 2*

1. There was sufficient evidence Lee robbed Carl

Robbery—"the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear' "

³ In a supplemental letter brief, Lee joined in Jordan's argument as to this issue.

(*People v. Gomez* (2008) 43 Cal.4th 249, 254 (*Gomez*))—has several distinct elements. Lee claims two were not proved: (1) there was no taking and (2) there was no intent to permanently deprive. We reject these claims.

a. *The taking*

The taking element of robbery has two necessary parts: “(1) achieving possession of the property, known as ‘caption,’ and (2) carrying the property away, or ‘asportation.’” (*Gomez, supra*, 43 Cal.4th at p. 255.) “To satisfy the asportation requirement for robbery, ‘no great movement is required, and it is not necessary that the property be taken out of the physical presence of the victim.’” (*People v. Hill* (1998) 17 Cal.4th 800, 852 (*Hill*).) “[S]light movement’ is enough to satisfy the asportation requirement.” (*Ibid.*)

Carll’s testimony established both aspects of the taking element. While outside of Lee’s BMW, Lee demanded that Carll put his cell phone in the car and threatened to knock Carll out if he did not comply. Lee added that there was a gun in the car. Carll, fearing he would get hurt, put his cell phone in the car.

Although Lee does not dispute that Carll put the cell phone in the car because Lee threatened to use force against him, Lee insists that he did not *take* Carll’s property because Lee did not physically possess Carll’s cell phone, and Lee only asked Carll to place the cell phone into Lee’s car. This is a distinction without legal significance. “Robbery does not necessarily entail the robber’s manual possession of the loot. It is sufficient if he acquired dominion over it, though the distance of movement is very small and the property is moved by a person acting under the robber’s control, including the victim.” (*People v. Martinez* (1969) 274 Cal.App.2d 170, 174.) Lee ordered Carll, under threat

of force, to relinquish his phone. When Carll complied and put his cell phone into Lee's car, Lee obtained dominion and control—caption—over the property. And, although the movement of the cell phone into the car was slight, the distance was sufficient to satisfy the asportation element.

Lee argues that Carll voluntarily discarded his cell phone when he jumped from the car thereby negating the taking element. Lee cites no authority for the novel proposition that after a victim complies with an order under threat of force to place his or her property in a car, is forced into the car, is assaulted with a firearm in the car, is driven away in the car, and is told he or she is going to be killed, then jumps out of the moving car to save his or her life but neglects to recover the property, the victim has abandoned the property. More to the point, Lee ignores that the taking was completed before Carll even entered the car, when Carll complied with Lee's order to put the cell phone into the car. Although the duration of the robbery continued until Carll escaped, the taking was complete for purposes of establishing guilt for robbery when Carll complied with Lee's demand. "The *commission* of a robbery does not require the robber to escape with the loot to a place of temporary safety. This concept should not be confused with the *duration* of the robbery, which continues so long as the loot is being carried away to a place of temporary safety." (*People v. Pham* (1993) 15 Cal.App.4th 61, 68.) Thus, there was substantial evidence that a taking occurred.

b. *Specific intent*

Next, Lee argues he did not intend to permanently deprive Carll of his cell phone. Intent "is seldom established with direct evidence but instead is usually inferred from all the facts and

circumstances surrounding the crime.” (*People v. Lewis* (2001) 25 Cal.4th 610, 643.) “ ‘ “[I]ntent to steal may ordinarily be inferred when one person takes the property of another,” ’ ” particularly if it is taken by force (*People v. Tufunga* (1999) 21 Cal.4th 935, 943) or fear. Here, Lee accomplished the taking with a *threat of force and with fear*. This alone is sufficient to support the inference that Lee had the specific intent to permanently deprive Carll of his cell phone. Still, Lee insists that he did not have intent to steal when he told Carll to place the phone into the car, but rather, Lee had a variety of ulterior motives including preventing Carll from making calls or taking pictures. Not only does Lee confuse motive with intent, there was no evidence of Lee’s alleged additional states of mind. Rather, these proffered rationales are simply speculative arguments. Even if Lee had been motivated by several desires, this did not preclude Lee from also harboring an intent to steal, for it is well settled that a defendant can harbor concurrent objectives. (*People v. Gurule* (2002) 28 Cal.4th 557, 628; see *People v. Melendrez* (1938) 25 Cal.App.2d 490, 494–495 [“The fact that the appellants may have had the intention of ravishing the female victim . . . does not eliminate their intent to rob her”].) For these reasons, we find that there is substantial evidence supporting the inference that Lee had the requisite intent to permanently deprive Carll of his cell phone.

2. There was sufficient evidence Lee committed kidnapping to rob

As to whether there was sufficient evidence of kidnapping to rob, *People v. Monk* (1961) 56 Cal.2d 288 (*Monk*), is illuminating. There, the victim Schaefer was in a shopping center when the defendant pointed a gun at her and said, “This is

a stick-up.” The defendant, armed with the gun, guided Schaefer six to eight feet to his car in a parking area, where he forced her into the car and, as she entered, told her to throw her wallet into the rear of the car. Schaefer complied. The defendant drove while holding the gun against her, and later said there was “ ‘more to come’ ” and he wanted what she had “ ‘between her legs.’ ” Schaefer subsequently threw herself out of the car. (*Id.* at pp. 293–295.) The defendant was convicted of kidnapping to rob and, on appeal, the defendant challenged the sufficiency of the evidence supporting the conviction. (*Id.* at pp. 292, 294.)

Monk, supra, 56 Cal.2d at page 295 concluded the kidnap to rob was complete when the defendant forced Schaefer to walk several feet to his car. Pertinent to the present case, *Monk* then stated, “Moreover, it has been held that where a kidnapping occurs after the actual perpetration of a robbery such kidnapping may be kidnapping for the purpose of robbery if it may reasonably be inferred that the transportation of the victim was to effect the escape of the robber or to remove the victim to another place where he might less easily sound an alarm. [Citations.] In the instant case Miss Schaefer was near a shopping center when defendant accosted her, and it could reasonably be inferred by the trial court that he forced her to accompany him in his car in order to prevent her from turning in an immediate alarm.” (*Ibid.*)

In the present case, Lee’s guilt for robbery was established when Carll put his cell phone in the car under the circumstances previously discussed. The kidnapping began at least when Lee drove the car away with Jordan and Carll inside and ended when Carll jumped out of the car. (Cf. *People v. Masten* (1982) 137 Cal.App.3d 579, 588 [kidnapping continues as long as the

detention does]; *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 407–408.) The jury reasonably could have inferred that Lee compelled Carll to accompany Lee in the car to effect Lee’s escape and to prevent Carll from turning in an immediate alarm.

B. *There was insufficient evidence to support Jordan’s conviction on counts 1 and 2*

1. Count 1, robbery

Although there was sufficient evidence to support Lee’s conviction on counts 1 and 2, we conclude otherwise as to Jordan, who asserts that Lee robbed Carll before he, Jordan, arrived. Respondent counters that since Jordan joined Lee in committing the kidnapping while the asportation of the loot—Carll’s cell phone—was ongoing, substantial evidence exists of Jordan’s guilt as an aider and abettor.

“For purposes of determining aider and abettor liability, the commission of a robbery continues until all acts constituting the offense have *ceased*. . . . Thus, in determining the duration of a robbery’s commission we must necessarily focus on the duration of the final element of the robbery, asportation. [¶] Although, for purposes of establishing guilt, the asportation requirement is initially *satisfied* by evidence of slight movement [citation], asportation is not confined to a fixed point in time. The asportation continues thereafter as long as the loot is being carried away to a place of temporary safety.” (*People v Cooper* (1991) 53 Cal.3d 1158, 1164–1165 (*Cooper*).)

While it is true that a robbery continues during the asportation, respondent misconstrues *Cooper* by ignoring a condition precedent of aider and abettor liability. “A person aids and abets the commission of a crime when he or she, (i) with

knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.” (Cooper, supra, 53 Cal.3d at p. 1164, italics added.)

There was no evidence that before the robbery, Jordan *knew* the robbery would occur. Similarly, after Jordan arrived, there was no evidence that he learned a robbery had occurred or was ongoing. Respondent hypothesizes that because Jordan joined right into Lee’s criminal conduct without any discussion with Lee, Jordan necessarily had prior knowledge of Lee’s plan and shared in his intent. While the record reveals substantial evidence that Jordan was involved in a pre-planned crime with Lee—kidnapping—there was no evidence that Jordan had prior knowledge of Lee’s additional unlawful purpose, perpetrating a robbery, or that Jordan intended to aid Lee in the commission of the robbery after he arrived. To be clear, the *absence* of a conversation does not establish substantial evidence that Jordan had the requisite *knowledge of the unlawful purpose of the perpetrator*, Lee. Moreover, the exchange between Jordan, Lee, and Carll was singularly focused on a distinct, unlawful purpose—kidnapping Carll because he was a snitch. While Carll testified he put the cell phone in the car, there was no evidence as to where he put it, e.g., on one of the front seats, on a rear seat, or on the floor behind, and/or under, the driver’s seat or front passenger seat. When Jordan entered the car, with Carll in the back seat, there was no evidence Jordan did so aware of the presence of the cell phone. Finally, when the three were in the car, there was no evidence anyone mentioned the robbery or cell phone. Here, a bare agreement to join in a kidnapping cannot

constitute substantial evidence of knowledge of a robbery or intent to facilitate commission of a robbery.⁴ Without knowledge of the preceding caption of property, Jordan could not have intended to assist Lee's taking of Carll's cell phone even if Jordan unwittingly aided the asportation of the phone. One who unintentionally aids a robbery cannot be an aider and abettor. Considering the entire record, we conclude there was insufficient evidence Jordan directly robbed Carll, or aided and abetted the robbery of Carll.

2. There was insufficient evidence Jordan kidnapped to rob, count 2

As for kidnapping to rob, "simple kidnapping is a necessarily included offense of kidnapping to commit robbery, the latter having an additional element of *intent to rob* that arises before the kidnapping commences." (*People v. Lewis* (2008) 43 Cal.4th 415, 518, italics added; see *Monk, supra*, 56 Cal.2d at p. 295 [gaining possession and slight movement of victim's property to reduce victim's chance of sounding alarm is kidnap with intent to rob].) In light of our previous discussion, we conclude there was no substantial evidence Jordan ever harbored intent to rob Carll; therefore, there was insufficient evidence Jordan committed kidnapping to commit robbery. In sum, insufficient evidence supports Jordan's convictions on counts 1

⁴ We note the trial court instructed the jury on the liability of principals and on the liability of aiders and abettors, but the court did not instruct on liability based on the natural and probable consequences doctrine.

and 2.⁵ We will reduce Jordan’s conviction on count 1 to a conviction for simple kidnapping. (*People v. Navarro* (2007) 40 Cal.4th 668, 671.)

II. Lee’s claim of prosecutorial error⁶ during jury argument is well taken

As to counts 1 and 2, Jordan and Lee claim the prosecutor committed misconduct by misstating the evidence and arguing facts not in evidence during his closing argument. Respondent asserts that Jordan, but not Lee, preserved this issue for appellate review but respondent denies that any misconduct or prejudice occurred. Although we have reversed Jordan’s convictions on these counts for insufficiency of the evidence, we discuss Jordan’s claim here to give context to Lee’s argument.⁷

A. *Applicable law*

“Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing

⁵ Because we have concluded insufficient evidence supports Jordan’s convictions on those counts, his alternative claims as to these counts are moot and double jeopardy protections bar a retrial on those counts. (*People v. Eroshevich* (2014) 60 Cal.4th 583, 591.)

⁶ As espoused by our Supreme Court, what occurred here is most appropriately labeled prosecutorial error. (See *Hill, supra*, 17 Cal.4th at p. 823, fn. 1.)

⁷ Although we reduced Jordan’s conviction to simple kidnapping, the prosecutorial misconduct claim only related to robbery; as such, any misconduct would not affect the conviction for simple kidnapping.

the evidence is misconduct. [Citations.] A prosecutor’s ‘vigorous’ presentation of facts favorable to his or her side ‘does not excuse either deliberate or *mistaken* misstatements of fact.’” (*Hill, supra*, 17 Cal.4th at p. 823, italics added.) A prosecutor’s assertion of facts not in evidence during closing argument may be particularly prejudicial because it is akin to unsworn witness testimony. “[S]uch testimony, ‘although worthless as a matter of law, can be ‘dynamite’ to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.’” (*People v. Bolton* (1979) 23 Cal.3d 208, 213 (*Bolton*)). Thus, whether the prosecutor’s misstatements were unintentional or purposeful does not matter for it is misconduct for a prosecutor to argue facts not in evidence. (*People v. Mendoza* (2016) 62 Cal.4th 856, 906.)

“Even where a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. [Citation.] Error with respect to prosecutorial misconduct is evaluated under *Chapman v. California* (1967) 386 U.S. 18 to the extent federal constitutional rights are implicated and *People v. Watson* (1956) 46 Cal.2d 818 [(*Watson*)] if only state law issues were involved.” (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 564.)

“Under the *Watson* standard, prejudicial error is shown where “ ‘after an examination of the entire cause, including the evidence,’ [the reviewing court] is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” [Citation.] “We have made clear that a ‘probability’ in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.” ’ ”

(*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 (*Richardson*).) Moreover, a result more favorable to a convicted defendant for purposes of *Watson* is not limited to an acquittal but includes a hung jury. (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1208; *People v. Mason* (2013) 218 Cal.App.4th 818, 826; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520–521 (*Soojian*).)

B. *The issue was preserved for appeal*

As a preliminary matter, respondent argues Lee forfeited the issue because he failed to object to the alleged misconduct and failed to request a jury admonition, which would have cured any harm.

“‘As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citations.]’ [Citation.] [¶] The foregoing, however, is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ‘“an admonition would not have cured the harm caused by the misconduct.”’ [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if ‘the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.’” (*Hill, supra*, 17 Cal.4th at p. 820.)

Here, as shown below, defense counsel in fact did *object twice*, during the prosecutor’s closing argument when he argued

facts not in evidence, and twice, the trial court immediately overruled the objections. Although admittedly it was Jordan's counsel who objected, once the trial court overruled the objections, it would have been pointless for Lee's counsel to lodge similar objections. Thus, respondent's argument that Lee forfeited the issue is rejected because we find that these measures would have been futile. (Cf. *People v. Gamache* (2010) 48 Cal.4th 347, 373.)

C. *Additional facts*

At trial, Carll's testimony regarding the robbery was limited and brief. Carll merely testified that Lee, alone, ordered him to place his cell phone in the car or Lee would hurt him. After Carll complied by placing his phone *in* the car, Jordan arrived. However, during the prosecutor's closing argument, his recitation of Carll's trial testimony contained numerous misstatements and instances of imprecision. Additional background facts are necessary to understand the manifestation of the prosecutor's recollection of Carll's trial testimony.

Carll was a reluctant witness. He was subpoenaed to appear at the preliminary hearing but failed to appear, requiring his arrest and remand into custody during his trial testimony. During pretrial hearings, the prosecutor told the court that he expected Carll to recant his prior statements to law enforcement. In his opening statement, the prosecutor candidly admitted to the jury that he had no idea what Carll was going to say in court. Nevertheless, the prosecutor recounted for the jury what Carll had previously told sheriff's deputies. That is, the prosecutor asserted that Lee *and* Jordan made Carll place the cell phone *on top of* the car and that Carll's *wallet*—in addition to his cell

phone—was stolen from him. This assertion, however, would turn out to be wholly unsupported by Carll’s testimony.

Further, in his opening statement, the prosecutor asserted a joint commission theory of the crimes that also would be contrary to the evidence⁸ that Lee and Jordan were present when Carll was threatened and his cell phone was taken, which was described as a black touch screen cell phone; that Jordan pulled out a gun from under the driver’s side seat and ordered Carll into the car; that Carll complied, then Lee entered the BMW and drove the three out to the desert; and that during the drive, Carll was ordered to empty his pockets, so he gave Lee and Jordan his green camouflaged wallet as well as a couple of lighters and other things in his pockets.⁹ Carll’s testimony did not support these statements.

Carll testified on Friday, June 10, 2016, as we described above in the factual background. In short, when Carll arrived at

⁸ The prosecutor also repeated this theory in the hypothetical question he posed to the People’s gang expert. The prosecutor’s question asked the expert to assume that a Ligget Street Gang (Ligget) member arrived at the restaurant; the Ligget member and a 4-Trey Gangster Crip Gang (4-Trey) member threatened to knock out the victim if he did not hand over his cell phone; the Ligget member pulled out a gun and demanded that the victim enter the car; the three entered the car; and either the Ligget member or 4-Trey member demanded that the victim “empty his pockets.” Jordan’s counsel objected to this question, but once again his objection was immediately overruled by the trial court.

⁹ Prior to trial, there was alleged information in Jordan and Lee’s preconviction reports and elicited at the preliminary hearing that was consistent with the prosecutor’s opening statement that appellants jointly committed the present crimes.

the restaurant, Lee was alone and he made Carll put his cell phone in the car. Jordan thereafter arrived. The trial then recessed until June 16, 2016. While the remaining testimony took two days, the prosecutor did not present his closing argument until the following week on Monday, June 20, 2016. By then, 10 days had passed since Carll had testified.

D. *The error*

In the intervening 10 days, the prosecutor's recollection of Carll's testimony had manifestly evolved. In fact, the prosecutor's closing argument matched his opening statement, in many respects, offering far richer "detail" than Carll's actual testimony.

"[The Prosecutor]: When [Carll] gets there, Mr. Lee is there and right afterwards Mr. Jordan rides up on that red bicycle. Remember, Mr. Lee is there in his car, *Mr. Jordan comes riding up a couple minutes into this whole thing* on his red bicycle. . . . *He just rides up and jumps right into the robbery.* [¶] So Mr. Lee threatens the victim. Demands his cell phone." (Italics added.) The prosecutor's recollection of the chronology misleadingly implied that Jordan was present when the taking took place. The uncontroverted evidence at trial, however, was that Jordan rode up on his bike *after* Lee had threatened Carll and after Carll had placed his cell phone *into* Lee's BMW.

The prosecutor's argument soon transitioned from an inaccurate argument to one full of falsehoods.

"[The prosecutor]: So [Carll] says, fine, I will give up the phone. Right? *He puts the phone on top of the car* and now *they* really have him right where *they* want him because now he doesn't have any way to get help.

“[Jordan’s Counsel]: Your Honor, I will object to that. It misstates the evidence.

“The Court: Overruled.

“[The Prosecutor]: . . . Mr. Jordan goes into the car and pulls out a gun . . . and points the gun at him. And *they* take his *wallet*, his phone. I think . . . some *lighters* or something like that. That he gave his *phone charger* and he had a *bag* with him. And *they* take that.” (Italics added.)

There was no “they.” Only Lee demanded property. More importantly, no one, not Lee and certainly not Jordan, took Carll’s wallet or lighters or phone charger. The testimony at trial established that the only property requested or taken was a cell phone and that was by Lee alone. Moreover, there simply was no evidence Carll “put[] the phone *on top* of the car.” The significance of this argument cannot be minimized. If Carll placed his property in plain view on top of the car, as opposed to secretly inside of the car, Jordan would have been in a position to see the property and, presumably, have knowledge that a robbery had or was occurring. In fact, the prosecutor explicitly argued this point: “Jordan gets there. He doesn’t ask a single question. . . . *Why is this stuff on top of your car?*” (Italics added.) Jordan had no reason to ask such a question because there was no evidence that “stuff” was on top of the car when he arrived.

The prosecutor continued in his closing argument to falsely argue that Jordan and Lee both actively participated in the taking of Carll’s property:

“[The Prosecutor]: Did Allen Carll get robbed, and the answer is, yeah, absolutely. . . . [H]e had *a wallet* and his phone. *Phone charger*. Even the *lighters* are property. [¶] *It was taken from his immediate presence*. . . . [¶] It’s against his will. He

told you—I mean I asked him, did you want to give him your phone and wallet? He said no. . . . [¶] . . . [¶] And, again, they are both part of this. They both helped. Mr. Lee actually tells him empty your pockets or give me your phone or whatever. Mr. Jordan, though, shows up right near the beginning and helps out by holding the gun on him.

“[Jordan’s Counsel]: Objection. Misstates the evidence.

“The Court: Overruled.” (Italics added.)

These statements were not true. Notwithstanding the prosecutor’s insistence, this question and answer session was based on imagined evidence. The prosecutor never asked Carll if he gave anyone his *wallet*. Moreover, there was no testimony that Lee told Carll to “empty your pockets” or that Jordan showed up “right near the beginning and help[ed] out by holding the gun on him.” (Italics added.) Jordan did point a gun at Carll, but this occurred later, when Jordan and Carll were in the car, long after Carll had given up his cell phone. Although Carll was asked whether he had a wallet and lighters in his pockets before he arrived at the restaurant, he never testified that they were *taken from him or his immediate presence*. These false and misleading statements were not isolated, but were repeated in the prosecutor’s rebuttal argument. The prosecutor told the jury, “Empty your pockets and give me your phone is the start of the conversation.” (Italics added.)

Finally, the prosecutor presented additional false facts that he repeatedly argued were in evidence—Carll’s cell phone was recovered in the attic: “[Sergeant Owen] goes back to search the attic . . . and he finds the victim’s wallet and cell phone.” [¶] . . . [¶] [Lee] goes and hides in the attic. Again, he is trying to get rid of evidence and he realizes, oh, man, I have his wallet. I have

started using it for myself. I put my own cards in it. [¶] So he drops the wallet. I have *his phone*. He drops the phone. Doesn't want to have that stuff on him. So he leaves it in the attic."

[¶] . . . [¶] And they intended to keep it. Well, we know they intended to keep it because they did keep it. In fact, Mr. Lee had the wallet with him *and the phone, too*, up in the attic, and ditched it there only because the police were coming. So that's an easy guilty." (Italics added.)

Conspicuously, there was no evidence that Carll's cell phone was found—in the attic or anywhere. While two cell phones, a black cell phone and a white cell phone, were recovered in the attic of the house on Avenue J-12 and admitted into evidence, remarkably, there was no direct or circumstantial evidence that either cell phone belonged to Carll. Carll was never asked to identify the cell phones admitted into evidence. Carll was never even asked to describe the color or type of his cell phone. In fact, the only description of Carll's cell phone was presented through the prosecutor, who in his opening statement, claimed that Carll's cell phone was a black, flip phone.

These falsities are particularly troublesome because the prosecutor's argument muddled a fact in evidence—Carll's cell phone was taken, with a fact not in evidence—Carll's cell phone was found in the attic where Lee was hiding.

E. *The error was prejudicial*

The improper facts in closing argument did not occur in a vacuum nor were they isolated or a simple slip of the tongue. Rather, this theme that both Jordan and Lee *teamed up* in robbing Carll of *multiple items of property*, including the fictional wallet, was a consistent theme of the prosecutor's from the beginning of the trial. The prosecutor first asserted these facts in

his opening statement.¹⁰ The prosecutor repeated these same facts in the hypothetical question he posed to the People’s gang expert.¹¹ Those facts were pervasive in his closing argument. Whether the prosecutor inadvertently misremembered Carll’s testimony, or intentionally misrepresented Carll’s testimony does not matter. The reason is straightforward—“[injury] to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.’” (*Bolton, supra*, 23 Cal.3d at p. 214.)

Although there was sufficient evidence Lee robbed Carll of his cell phone, there is, nonetheless, a reasonable chance the jury convicted Lee based on the prosecutor’s misstatements—the recurring references to “empty your pockets,” that other property, particularly his wallet, was *taken from Carll’s immediate presence*, and that Carll’s cell phone was recovered in the attic.

First, the wallet was critical to the prosecutor’s argument that the taking element of the robbery was satisfied. The prosecutor strenuously argued that the fact that the wallet was found in an area where Lee was hiding and contained Lee’s identification corroborated Carll in two respects: first, his property was taken and, second, Lee and Jordan took the wallet by threat of force from Carll’s person. The argument was particularly compelling because there was overwhelming evidence that the green and brown wallet found in the attic belonged to Carll. At trial, Carll identified the wallet as his and Deputy Owen testified he recovered Lee’s driver license and EBT

¹⁰ It is apparent the prosecutor modeled his closing argument on his opening statement.

¹¹ See footnote 8, *ante*.

card in the wallet. As shown below, however, the thrust of the prosecution's case that the recovered green wallet established that a robbery ensued was legally invalid.

Rodriguez v. Superior Court (1984) 159 Cal.App.3d 821 (*Rodriguez*) is instructive. In that case, the victim left her purse in the defendant's car before he forced her out, raped her and drove away with the purse. There was no evidence defendant knew her purse was left in his car when he drove off. The court held that the lack of evidence that the defendant had knowledge of the presence of the purse when he was in the presence of the victim defeated the inference that a felonious taking had occurred.

Here, as in *Rodriguez*, the wallet could not have established a felonious taking. There was no evidence that a demand for Carll's wallet or a command to empty his pockets was made, or that Lee or Jordan was aware of the presence of the wallet when Carll was in their presence, i.e., before Carll fled. While there was substantial evidence that Lee hid Carll's wallet in the attic, that Lee later possessed the wallet is insufficient evidence to support the inference that the wallet was obtained *feloniously*, that is, Lee had an intent to steal Carll's wallet from Carll's immediate presence. There is, moreover, a reasonable alternative inference that points to innocence: Carll left his wallet in the car inadvertently when he jumped out of the moving vehicle. (See, e.g., *Rodriguez, supra*, 159 Cal.App.3d 821.) More to the point, there was no evidence that an intent to steal *the wallet* was formed or that the wallet was taken by force or fear, from Carll's person or immediate presence.

Second, the prosecutor also falsely argued that Carll's cell phone was recovered in the attic, along with Carll's wallet. While

there was evidence that the cell phone was taken, there was no evidence it was recovered. Conversely, while there was evidence that Carll's wallet was recovered, there was no evidence it was taken. In other words, the prosecutor blurred real evidence with imagined evidence in order to bolster a taking. The prejudicial impact of the prosecutor's decision to depend on the non-felonious taking of the wallet and to falsely argue that Carll's cell phone was recovered in the attic to substantiate a robbery cannot be minimized. By inextricably linking real and imagined evidence, we cannot now on appeal conclude that the jury relied on only the real evidence. Since Carll's wallet and the so-called recovery of Carll's cell phone played an essential role in the prosecutor's argument that a felonious taking of personal property occurred, there is a reasonable likelihood that the jury relied on these remarks to convict Lee of robbery and kidnapping to commit robbery.

Third, it is the rare case where we have irrefutable evidence that the jury relied on the prosecutor's argument rather than facts that were in evidence in reaching its verdict. This is that rare case. Jordan could *only* have been convicted of robbery and kidnapping to commit robbery if the jury relied on facts not in evidence. As shown earlier, there was no substantial evidence to support Jordan's robbery and kidnapping to commit robbery convictions.

We must be mindful of the "special regard" that jurors place on prosecutor's words (see *Bolton, supra*, 23 Cal.3d at p. 213) and the fact that the trial court twice overruled the objectionable statements in evaluating prejudice. On two occasions during the prosecutor's closing argument, defense counsel objected on the grounds that the prosecutor was arguing

facts not in evidence. On each occasion, the objections were overruled. Here, there is no doubt that the jury gave “special regard” to the prosecutor’s words during his argument since the jury necessarily relied on the objectionable remarks of the prosecutor to convict Jordan. Moreover, we cannot say with confidence that the court’s instructions were sufficient to cause jurors to reject those statements and “purge them from their minds” (*People v. Woods* (2006) 146 Cal.App.4th 106, 118) thereby eliminating the prejudice resulting from the unchecked misstatements of the prosecutor when considering Lee’s case. “Although the prejudicial effect of mild misconduct during argument may be dissipated by an instruction that the statements of the attorneys are not evidence [citation], an instruction is not a magical incantation that erases from jurors’ minds a prosecutor’s erroneous representations, especially when the trial court implicitly endorses the representations by overruling defense counsel’s objections.”¹² (*Id.* at p. 118.) Since the jury necessarily relied on the objectionable remarks of the prosecutor to convict Jordan, there is a reasonable probability that the jury used impermissible facts similarly to convict Lee of robbery and kidnapping to commit robbery.

Our conclusion is further buttressed by the fact that during deliberations, the jury asked for a readback of Carll’s testimony,

¹² The court, using CALJIC No. 1.02, instructed the jury that statements made by attorneys were not evidence. The court also instructed the jury, using CALJIC No. 2.82, that hypothetical questions posed to an expert witness could only be considered if the jury found that a fact upon which an opinion was based was proven.

but the jury ultimately reached its verdicts before any such readback.

“Although we might conclude any single instance of misconduct was harmless . . . [¶] . . . [¶] [t]he sheer number of the instances of prosecutorial misconduct . . . is profoundly troubling. Considered together, we conclude they created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors.” (*Hill, supra*, 17 Cal.4th at pp. 845–847.)

Accordingly, we conclude there was a “ ‘reasonable chance’ ” (*Richardson, supra*, 43 Cal.4th at p. 1050) that absent the prosecutor’s misstatements during closing argument, a result more favorable to Lee, including a hung jury (*Soojian, supra*, 190 Cal.App.4th at pp. 520–521), would have occurred. In other words, there was a reasonable probability sufficient to undermine confidence in the outcome. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.) The judgment must be reversed as to Lee’s convictions for robbery and kidnapping to rob, permitting a retrial on counts 1 and 2 as to him.¹³

III. Senate Bills Nos. 620 and 1393

Jordan’s sentence included terms for the firearm enhancements under former sections 12022.5 and 12022.53 and a term for a prior serious felony conviction under former section 667, subdivision (a). Lee’s sentence included a term for his prior

¹³ There is no need to reach the issue of whether the prosecutor’s misconduct amounted to federal constitutional error; the misconduct violated state law and was independently prejudicial as to counts 1 and 2 under the *Watson* prejudice standard, requiring reversal of Lee’s convictions on those counts.

serious felony conviction under former section 667, subdivision (a). When Jordan and Lee were sentenced, the trial court lacked discretion to strike those enhancements. As we now explain, recent legislation grants trial courts the discretion they had once lacked.

Effective January 1, 2018, the Legislature amended section 12022.5, subdivision (c), and section 12022.53, subdivision (h), to give trial courts authority to strike section 12022.5 and section 12022.53 firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.) Those amendments apply to cases, such as this one, that were not final when the amendments became operative. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091.) Remand is necessary to allow the trial court an opportunity to exercise its sentencing discretion under the amended statutes. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

Similarly, Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1–2) became effective January 1, 2019. Senate Bill No. 1393 amends sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or to dismiss a prior serious felony conviction for sentencing purposes. Senate Bill No. 1393 is “ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes.” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) And, as with Senate Bill No. 620, Senate Bill No. 1393 applies retroactively to all cases not final when it took effect. (*Garcia*, at p. 973.)

Based on this new law, Jordan and Lee's sentences must be vacated. We express no opinion about how the trial court's discretion should be exercised on remand.

DISPOSITION

The judgment as to Damien Eric Jordan is modified by reducing his conviction for kidnapping to commit robbery (count 1) to a conviction for simple kidnapping, and reversed as to his conviction for second degree robbery (count 2). The judgment as to Charles Edward Lee is modified by reducing his conviction for kidnapping to commit robbery (count 1) to a conviction for simple kidnapping unless, following remand, the People elect to retry Lee for kidnapping to commit robbery (count 1); reversed as to his conviction for second degree robbery (count 2) with the reversal constituting an order for a new trial (Pen. Code, § 1262) as to the robbery count. Appellants' sentences are vacated for further proceedings consistent with this opinion. The judgments are otherwise affirmed.

Because we reverse, in part, on the ground of prosecutorial misconduct, we direct the clerk of the court to forward a copy of this opinion to the State Bar. (Bus. & Prof. Code, § 6086.7, subd. (a)(2).)

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS.**

KALRA, J.*

I concur:

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

EDMON, P.J., Concurring and Dissenting.

I concur with much of the majority opinion. Like the majority, I conclude there was insufficient evidence Jordan committed robbery and kidnapping for robbery, and that his conviction on the latter offense should be reduced to simple kidnapping. I also agree with the majority's conclusion that the converse is true as to Lee; as to him, the evidence was sufficient to prove both robbery and kidnapping for robbery. And, I agree that the matter must be remanded for resentencing in light of Senate Bill Nos. 620 and 1393. But I respectfully part company with the majority insofar as it holds Lee's convictions must be reversed due to prosecutorial misconduct during argument. In my view, most of the prosecutor's challenged statements were not improper; and in any event, there is no reasonable probability the jury would have rendered a more favorable result for Lee in the absence of any of the alleged misconduct. Further, I find no merit in Lee's contention that the trial court prejudicially erred by refusing to bifurcate trial of the gang enhancements. Accordingly, I would affirm Lee's convictions for robbery and kidnapping for robbery.

I. Prosecutorial misconduct

A. *Applicable legal principles*

The standards governing prosecutorial misconduct are well settled. “When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it

involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.’ [Citation.]” (*People v. Masters* (2016) 62 Cal.4th 1019, 1052; *People v. Ghobrial* (2018) 5 Cal.5th 250, 289.) It is misconduct for a prosecutor to base argument on facts not in evidence. (*People v. Mendoza* (2016) 62 Cal.4th 856, 906; *People v. Linton* (2013) 56 Cal.4th 1146, 1207; *People v. Thomas* (2011) 51 Cal.4th 449, 494–495.)

When a claim of misconduct is based on the prosecutor’s comments before the jury, we consider whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 427.) We consider the challenged statements in context, and view the argument as a whole. (*People v. Winbush* (2017) 2 Cal.5th 402, 480; *People v. Cole* (2004) 33 Cal.4th 1158, 1203.) We do not lightly infer that the jury drew the most, rather than the least, damaging meaning from the prosecutor’s statements. (*People v. Shazier* (2014) 60 Cal.4th 109, 144; *People v. Dykes* (2009) 46 Cal.4th 731, 771–772.)

To preserve a claim of prosecutorial misconduct, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. (*People v. Winbush, supra*, 2 Cal.5th at p. 481; *People v. Linton, supra*, 56 Cal.4th at p. 1205.) “Error with respect to prosecutorial misconduct is evaluated under *Chapman v. California* (1967) 386 U.S. 18 to the extent federal constitutional rights are implicated and *People v. Watson* (1956) 46 Cal.2d 818 . . . if only state law issues were involved. [Citation.] *Chapman* is implicated if the prosecutor’s conduct renders the trial so fundamentally unfair that due process is violated. [Citations.]

Watson applies where the prosecutor uses “ ‘deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 564.) Thus, “ ‘[i]n order to be entitled to relief under state law, defendant must show that the challenged conduct raised a reasonable likelihood of a more favorable verdict.’ [Citation.] Under federal law, relief is not available if ‘the challenged conduct was . . . harmless beyond a reasonable doubt.’ ” (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 854.)

B. *Alleged misstatements regarding the evidence*

The majority characterizes the prosecutor’s argument as “full of falsehoods.” (Maj. opn., *ante*, at p. 19.) It also faults the prosecutor’s opening statement, and a hypothetical posed to the gang expert, as inaccurate. (Maj. opn., *ante*, at p. 18 & fn. 8.) I disagree.

1. Opening statement

First, to the extent the majority finds the prosecutor’s opening statement problematic, I disagree. The prosecutor’s comments in the opening statement did not constitute misconduct, because the prosecutor reasonably could have believed the trial evidence would support them.

At the preliminary hearing, Detective Dale Parisi testified that Carll told him that, in response to a phone call, Carll arrived at the restaurant to talk to Lee. While he was talking to Lee, Jordan rode up on his bicycle. Lee told Carll to hand over his phone or he would knock him out. Jordan retrieved a gun from the car and told Carll to tell the truth or he would kill him. Lee told him to get in the car. In response, Carll handed over his phone and got in the back seat. The group then drove off, with

Lee driving and Jordan sitting in the front seat. Lee told Carll to “empty his pockets.” Carll complied, removing two lighters, a mechanical pencil, and his wallet, and handed them to Jordan, who had the gun in his hand. Jordan told him “they” were going to take him to Avenue B and kill him.

Detective James Speed interviewed both Jordan and Lee. Jordan told the detective that, while holding the gun, he told Carll to get in the car. Jordan saw Carll’s wallet and cards in the car’s center console and thought Lee might have taken them. Lee told the detective that he, Jordan and Carll discussed the rumors Carll had been spreading; Jordan, who had a gun, told Carll to get in the car or he would pistol whip him; and Lee also told Carll to get in the car. Carll’s phone was left in the car, and Jordan sold it to Lee for \$35. At that point, Jordan had already taken Carll’s wallet.

In light of this information, the prosecutor’s statements that “they” forced Carll into the car at gunpoint, took his wallet, phone, and other items, and threatened him, was not misconduct. In an opening statement, an attorney is to state what he or she expects the evidence to be. (See *People v. Peoples* (2016) 62 Cal.4th 718, 799 [the function of opening statement is to inform the jury of the expected evidence]; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1342.) As the majority acknowledges, the victim’s previous statements to police were consistent with the prosecutor’s opening statement, and it was not misconduct for the prosecutor to state that he expected the victim to testify consistently with his prior statements. (Maj. opn., *ante*, at p. 18, fn. 9.) The defendants’ statements also suggested what the evidence at trial might prove. Moreover, the prosecutor expressly cautioned the jury that he had “no idea” how Carll would

ultimately testify, acknowledging that the evidence might or might not be as expected. There was no misconduct.

2. The hypothetical posed to the gang expert

The same is largely true in regard to the hypothetical posed to the gang expert. The gang expert was the first witness at trial. Thus, when the prosecutor posed the hypothetical, he could not be sure how Carll would testify. The hypothetical was consistent with Carll's and Jordan's pretrial statements to detectives, with one exception: the prosecutor asked the expert to assume the "Ligget Street gang member," i.e., Jordan, threatened to knock the victim out unless he handed over his phone, whereas Carll told the detective that it was Lee who made this statement. But, this misstep was insignificant: according to Carll's pretrial statements, *both* Jordan and Lee were present when the demand was made, suggesting both were principals in the crime. In any event, no prejudice is apparent for several reasons. The jury was instructed that (1) by allowing the hypothetical, the court had not found any of the assumed facts had been proved; (2) that question was for the jury; and (3) if it concluded any of the assumptions had not been proved, the jury was to take that into consideration when evaluating the expert's opinion. (CALJIC No. 2.82.) Given that the jury found the gang enhancements not true as to both defendants, there is no possibility of prejudice under any standard. And, given that the only misstatements pertained to Jordan, and we are reversing Jordan's robbery conviction and reducing his kidnapping for robbery conviction in any event, no prejudice can have ensued.

3. Implication that Jordan was present when Lee robbed Carll of his phone and “actively participated” in taking Carll’s property

Moving to the prosecutor’s argument, the majority avers that the prosecutor “misleadingly implied that Jordan was present when the taking” of the phone transpired. (Maj. opn., *ante*, at p. 19.) Not so. In the cited portion of the argument, the prosecutor stated: “When [Carll] gets there, Mr. Lee is there and right afterwards Mr. Jordan rides up on that red bicycle. Remember, Mr. Lee is there in his car . . . Mr. Jordan comes riding up a couple minutes into this whole thing on his red bicycle. But it’s obvious that he knows what’s going on and is in on it because he rides up, there is no discussion between the two of them about, hey, what’s going on, who is this person or none of that. He just rides up and jumps right into the robbery.” The prosecutor then described how Lee threatened to knock Carll out if he did not turn over his phone; that “they [told] him to get in the car”; Carll complied out of fear; and Jordan pulled a gun from underneath the driver’s seat.

Even assuming *arguendo* that Lee has not forfeited his prosecutorial misconduct claims,¹ the prosecutor’s statements

¹ The majority excuses Lee’s failure to object to *any* of the prosecutor’s arguments, reasoning that once the trial court overruled two of Jordan’s counsel’s objections, it would have been futile for Lee’s counsel to object. (Maj. opn., *ante*, at pp. 16–17.) I am not convinced. Lee’s complaint is that the prosecutor repeatedly misstated the evidence in a variety of ways. Jordan’s counsel objected to only two of these instances. Even assuming *arguendo* the trial court’s rulings were error, there is no showing it would have been futile for Lee to interpose objections to additional, different misstatements. (See *People v. Powell* (2018))

were a fair comment on the evidence. The time frame during which events transpired was inexact. Carll testified that he arrived at the restaurant to find Lee and another man present; and within the next 10 to 15 minutes, Lee robbed him of his phone. When the prosecutor asked, “What happened next?” Carll answered, “And then Blood Face [i.e., Jordan] showed up.” Based on this evidence, it was not misleading to argue that Jordan showed up “a couple minutes” after the robbery. The salient point—that despite Jordan’s tardy arrival, he must have been in on the plan beforehand given his conduct—was certainly a fair comment on the evidence. Prosecutors have “ ‘ ‘wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]’ ” (*People v. Sandoval* (2015) 62 Cal.4th 394, 439; *People v. Shazier, supra*, 60 Cal.4th at p. 127 [prosecutors have wide latitude to draw inferences from the evidence, and whether the inferences are reasonable is for the jury to decide].)

6 Cal.5th 136, 171 [“there is no merit in defendant’s argument that the court’s ruling on his single objection rendered it futile for him to object again”]; *People v. Daveggio and Michaud, supra*, 4 Cal.5th at p. 861 [“claims of futility must generally be tied to the type of objection that would have been futile”].) The question of whether an argument misstates the evidence is highly fact-specific; just because a trial court overrules one objection—even erroneously—does not mean the court will overrule all such objections to different arguments regarding different evidentiary issues. Nonetheless, because Lee argues his counsel was ineffective for failing to object, I consider the merits of his arguments.

Moreover, viewing the argument in context, the jury could not have understood the prosecutor to mean Jordan was physically present when Lee robbed Carll of the phone; the prosecutor repeatedly acknowledged the opposite, referencing the fact that Jordan was “late.”² Indeed, the prosecutor immediately corrected himself when he once misstated the point, clarifying that only Lee demanded the phone.³ And, Jordan’s counsel effectively argued, during his closing, that the evidence showed Jordan was not present during the phone taking, further dispelling any possibility the jury construed the prosecutor’s

² For example, the prosecutor argued at various points: “Mr. Jordan, though, shows up right near the beginning and helps out by holding the gun on him. . . . Telling him . . . we are going to take you out to the desert . . .” “It just takes Mr. Jordan a couple extra minutes to get there because he is riding a bicycle. When he gets there, he jumps right in. He jumps in without any conversation and helps out. He knows what they are doing.” “The only reason Jordan is not there at the very start is because he is late because he is riding his bicycle there instead of taking a car like Mr. Lee.” “[Counsel] says [Jordan] gets there and the crime’s either over or almost over, the robbery part . . . the taking of property. So how do we know he was in on it? Well, here’s how: it is obviously preplanned” in light of Jordan’s failure to “ask a single question” or engage in any discussion with Lee regarding what was transpiring.

³ When rebutting a defense argument, the prosecutor argued: “That wasn’t what happened. They didn’t say at first just empty your pockets. *They specifically [said] give us your phone.*” (Italics added.) Jordan’s counsel objected that the argument misstated the evidence, and before the court could rule, the prosecutor immediately said, “I’m sorry. Mr. Lee says . . . [¶] . . . ‘I will knock you out if you don’t give me your phone.’”

argument in an objectionable fashion. As noted, we must consider the challenged statements in the context of the argument as a whole, and do not lightly infer that the jury drew the most, rather than the least, damaging meaning from the prosecutor's statements. (*People v. Winbush*, *supra*, 2 Cal.5th at p. 480; *People v. Covarrubias* (2016) 1 Cal.5th 838, 894; *People v. Shazier*, *supra*, 60 Cal.4th at p. 144.)

Nor do I discern misconduct in the prosecutor's contention that Jordan "actively participated" in taking Carll's property. (Maj. opn., *ante*, at p. 20.) The prosecutor's theory was that Jordan and Lee conspired to kidnap and kill—or at least intimidate—Carll because he had purportedly spread false rumors that Jordan killed a child at an abandoned apartment in the neighborhood.⁴ The prosecutor argued that Jordan's knowledge and intent to assist this endeavor was shown by the fact he arrived at the restaurant and immediately began participating in the scheme, without any conversation with, or questions to, Lee. This was a reasonable theory. The prosecutor suggested part of the plan was to take Carll's phone at the outset so that he could not call for help or photograph his abductors. There was nothing improper about this argument; it was a fair comment on the evidence. (See *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1342 [closing argument "'presents a legitimate opportunity to 'argue all reasonable inferences from evidence in the record' '"]].)

In any event, the challenged comments could not have prejudiced Lee. Even if an argument that both Jordan and Lee

⁴ The prosecutor was careful to point out that the rumor was "not true" and "Mr. Jordan didn't do that"

were present for, or participated in, the phone robbery might have been prejudicial as to *Jordan*, clearly it was not *as to Lee*. The prosecutor's comments were correct as to Lee: the undisputed evidence showed Lee *did* order the victim to relinquish his phone by means of force or fear. As the majority correctly reasons, this evidence was sufficient to prove robbery. In that we are reversing Jordan's robbery conviction and reducing his kidnapping for robbery conviction to simple kidnapping, any potential prejudice as to him is irrelevant.⁵

4. Argument that Lee ordered Carll to place the cell phone on, rather than in, the car

The majority also finds it troublesome that the prosecutor stated that Lee ordered Carll to place the cell phone *on top of* the car, rather than *inside* the car, given that Carll testified to the latter but not the former. (Maj. opn., *ante*, at pp. 17, 19–20.) But, again, as to Lee, this statement was inconsequential. The important point was that Lee required the victim, by means of threats, to relinquish the phone and place it within Lee's control. Whether on or in Lee's car made little, if any, difference. The majority avers that the prosecutor's argument "cannot be minimized," because the prosecutor argued the fact the property was on top of the car supported a finding *Jordan* knew of, and was aiding and abetting, the robbery. (Maj. opn., *ante*, at p. 20.)

⁵ The majority avers that Jordan's claims of prejudice must be addressed in order to "give context" to Lee's argument. (Maj. opn., *ante*, at p. 14.) I do not agree. The evidence as to Lee and Jordan was different. Therefore, the potential prejudicial impact of the prosecutor's arguments on each defendant is also different.

But, as noted, in light of our disposition of Jordan’s case the effect of the prosecutor’s argument *as to Jordan* is irrelevant.

And, it is difficult to characterize the prosecutor’s statements as egregious, unfair, deceptive, or reprehensible in light of the treatment of this evidence by the court and all parties at trial. At the close of the People’s case, when discussing a defense section 1118.1 motion, both defense attorneys and the trial court stated that the evidence showed Carll placed his property *on top of* the car. Likewise, during closing arguments, both defense attorneys argued that Lee told Carll to put his property on top of the car. Given that both defense attorneys—as well as the trial court—were all operating under the assumption that the phone was placed on top of the car, I find it inconceivable that the phone’s location had particular significance.

5. The phone, the wallet, and the prosecutor’s reference to other items

The majority faults the prosecutor for arguing that the phone found in the attic was Carll’s, when there was no conclusive evidence on this point. (Maj. opn., *ante*, at pp. 21–22.) In my view, the prosecutor was simply drawing permissible inferences from the evidence. As the majority acknowledges, there was “overwhelming evidence” that the wallet found in the attic belonged to Carll. (Maj. opn., *ante*, at p. 23.) The evidence showed Lee was using the wallet. The wallet was discovered in the attic together with two phones. An attic is an unusual place to store either a phone or a wallet. The prosecutor could reasonably argue, based on this circumstantial evidence, that the phone—found with other property belonging to Carll—was in fact Carll’s. A “ “prosecutor has a wide-ranging right to discuss the case in closing argument, . . . [including] the right to fully state

[his or her] views as to what the evidence shows and to urge whatever conclusions [he or she] deems proper.” ’ ” (*People v. Seumanu*, *supra*, 61 Cal.4th at p. 1342.)

Indeed, the parties appear to have recognized that the prosecutor’s argument was legitimate. Outside the jury’s presence, Lee’s counsel requested that the white phone found in the attic be excluded, because it was not connected to the victim; he did not make a similar request as to the black phone, tacitly acknowledging there was sufficient circumstantial evidence to connect the black phone to Carll. During argument, Lee’s counsel pointed out that the black phone had not been conclusively shown to be Carll’s; for example, it had not been examined for identifying information linking it to Carll. But counsel acknowledged the circumstantial evidence could lead to a conclusion the phone either was, or was not, Carll’s. The prosecutor can hardly be said to have engaged in egregious or deceptive misconduct by making an argument that the defense acknowledged was colorable.

While recognizing that there was ample evidence the wallet was Carll’s, the majority nonetheless finds that the prosecutor committed misconduct by arguing Lee took it from him. (Maj. opn., *ante*, at pp. 21–22.) Again, in my view, for the most part the prosecutor’s argument was based on fair inferences from the evidence. Carll testified he had his wallet in his pocket. After the kidnapping, Carll’s wallet was discovered in the attic, with Lee’s items inside. It was certainly a reasonable inference that Carll did not voluntarily hand over his wallet; arguably, at least, it was a permissible inference that the wallet was taken as part of the same robbery that yielded the cell phone. While other explanations may have existed—i.e., that Carll accidentally left

the wallet in the car when he jumped out—that does not render the argument improper.

There is no question the prosecutor made several misstatements about the evidence. He averred that he asked Carll, during direct examination, whether Carll had wanted to give up the wallet and phone, and Carll said he relinquished them out of fear. In fact, the prosecutor only asked about relinquishment of the phone. The prosecutor also stated that Lee told Carll to “empty your pockets or give me your phone or whatever,” and that appellants took, in addition to the wallet and phone, “I think some other things he said he had like some lighters or something like that. That he gave them his phone charger and he had a bag with him. And they did take that.” Carll’s testimony did reference some of these items: Carll testified that when he met with Lee, he had with him a white bag and some lighters; he also affirmed that he had identified to police a blue bag found in Lee’s BMW as looking like his property. However, he did not testify these items were taken and there was no evidence they were found in Lee’s possession. Thus, although Carll told a detective prior to trial that Lee ordered him to empty his pockets and he complied by giving Jordan two lighters and his wallet, this evidence was not adduced at trial. The prosecutor’s contrary statements were erroneous.

However, I cannot conclude that these relatively brief and minor errors either infected the trial with unfairness sufficient to deny Lee due process, undermined confidence in the trial’s outcome as to him, or amounted to deceptive or reprehensible conduct. (See *People v. Masters, supra*, 62 Cal.4th at p. 1052.) As explained, the evidence Lee robbed Carll of his phone, by means of threats, was essentially undisputed. Given that evidence, the

jury was unlikely to place much weight on the prosecutor's vague statements about the lighters, the charger, and the bag, or the reference to a demand that Carll empty his pockets. Thus, even had the prosecutor omitted these statements from his argument, there is no reasonable probability the jury would have reached a different verdict as to Lee. (See, e.g., *People v. Jackson* (2016) 1 Cal. 5th 269, 350; *People v. Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 854.)

In sum, I find no prosecutorial error or misconduct sufficient to require reversal.

C. *Argument that the jury should not consider penalty or punishment*

Lee argues that the prosecutor also committed prejudicial misconduct by making an improper reference to sentencing during his argument.⁶ This contention is meritless.

The prosecutor argued that it was not the jury's job to decide the case based on bias, prejudice, or the like, nor should it engage in speculation. The prosecutor continued: "And then last, what should happen next. Consequences. Not your job. That is Judge Chung's job. Your job is to decide the facts. What happened on May 25th. Follow the evidence wherever it takes you and return a fair verdict based on that evidence. [¶] Judge Chung then takes the next step in deciding how serious is this. The mitigating factors." Jordan's counsel's "improper argument" objection was overruled. The prosecutor continued: "That is all his job. That is not your job."

⁶ Because I would affirm Lee's convictions, I address the additional arguments raised by him that were not addressed by the majority.

Lee contends the prosecutor's remarks were unfair and improper because they implied the trial court had sentencing discretion, including the option of simply giving him a proverbial "slap on the wrist" for his role in the offenses, whereas in fact, the statutory sentence for kidnapping is life in prison. The remarks were problematic, he complains, because they "absolved the jury of all responsibility in the decision making process by permitting them to falsely believe" he could escape punishment entirely, making it "more likely that jurors will convict and go home under the erroneous belief that the judge can and will clean up any of their mistakes."

In a non-capital case, a defendant's possible punishment is not a proper matter for the jury's consideration. (*People v. Ruiloba* (2005) 131 Cal.App.4th 674, 692; *People v. Nichols* (1997) 54 Cal.App.4th 21, 24; CALCRIM No. 3550; CALJIC No. 17.42.) It is therefore improper for a prosecutor to reference punishment during trial. (*People v. Thomas, supra*, 51 Cal.4th at p. 486.)

Here, the jury was properly told, via CALJIC No. 17.42, that it must not consider penalty or punishment during deliberations.⁷ The prosecutor's admonition that jurors should not consider penalty did nothing more than echo this instruction, and was not objectionable. I do not believe reasonable jurors would have interpreted the prosecutor's comments as suggesting that Lee might escape punishment, or that the court would "clean up" their "mistakes," as Lee suggests. (See *People v. Shazier, supra*, 60 Cal.4th at p. 144 [we do not lightly infer that the jury

⁷ CALJIC No. 17.42 provided: "In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict."

drew the most, rather than the least, damaging meaning from the prosecutor's statements].) To the extent Lee's argument suggests jurors should be aware that a defendant who is found guilty will receive a substantial prison sentence, it is inconsistent with the law.

II. Failure to bifurcate trial of the gang enhancement

Prior to trial, both appellants moved to bifurcate trial of the gang enhancements. The trial court denied their request, reasoning that (1) the People had alleged a gang enhancement, and (2) the gang evidence was relevant to prove motive and intent, and to give context to defendants' conduct. Applying Evidence Code section 352, the trial court concluded the probative value of the evidence outweighed any possible prejudice. Lee contends the trial court's failure to bifurcate the gang enhancement was error and deprived him of his Sixth and Fourteenth Amendment rights to a fair trial.⁸ He points out that the victim was not a gang rival; he did not reference his gang during the offenses; and admission of the evidence served only to vilify the defendants. I disagree.

A trial court has discretion to bifurcate the trial of a gang enhancement allegation from the trial of the substantive offense. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*); *People v. Franklin* (2016) 248 Cal.App.4th 938, 952 (*Franklin*).) Bifurcation is appropriate where the gang evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the

⁸ In light of our disposition of Jordan's appeal, I do not reach the question of whether the gang evidence was prejudicial as to him.

defendant's actual guilt." (*Hernandez*, at p. 1049.) But where, as here, a gang enhancement is charged, it is "by definition, inextricably intertwined with [the charged offense]." (*Id.* at p. 1048.) Accordingly, "the trial court's discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*Id.* at p. 1050; *Franklin*, at p. 952 ["Given the public policy preference for the efficiency of a unitary trial, a court's discretion to deny bifurcation of a gang allegation is broader than its discretion to admit gang evidence in a case with no gang allegation"].) Even where a gang enhancement is *not* charged, evidence of gang membership is "often relevant to, and admissible regarding, the charged offense" on issues such as motive and intent. (*Hernandez*, at p. 1049; *Franklin*, at p. 952.) Bifurcation is unnecessary if the evidence supporting a gang enhancement would be admissible at trial of the substantive offenses. (*Hernandez*, at pp. 1049–1050 ["To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary"].) Even if some of the evidence offered to prove the enhancement would be inadmissible at a trial on the substantive crime pursuant to Evidence Code section 352, a court "may still deny bifurcation." (*Hernandez*, at p. 1050.) The defendant has the burden to establish there is a substantial danger of prejudice requiring bifurcation. (*Id.* at pp. 1050–1051.)

We review the trial court's denial of a bifurcation motion for abuse of discretion, based on the record as it stood at the time of the ruling. (*Hernandez, supra*, 33 Cal.4th at p. 1048; *Franklin, supra*, 248 Cal.App.4th at p. 952; *People v. Burch* (2007) 148

Cal.App.4th 862, 867.) “Our review is guided by the familiar principle that ‘[a] court abuses its discretion when its rulings fall “outside the bounds of reason.” ’ [Citations.] If the trial court’s ruling was correct on the record before it, the ruling is subject to reversal only upon a showing that ‘ “joinder actually resulted in ‘gross unfairness’ amounting to a denial of due process.” ’ ” (*Franklin*, at pp. 952–953.)

Because the gang evidence here was admissible as to the substantive charges, any inference of prejudice was dispelled. (*Hernandez, supra*, 33 Cal.4th at pp. 1049–1050.) The gang evidence was relevant to prove the motive for the crime. The People’s theory was that Jordan and Lee kidnapped, robbed, and assaulted Carll because Carll had been spreading rumors that Lee killed a child in an abandoned apartment building. The gang expert testified that respect is important in gang culture. Although gangs look favorably upon the commission of certain crimes, others, including crimes against children, are disfavored. Crimes against children are viewed in a “tremendous[ly]” negative light. If someone spread rumors that a gang member had killed or molested a child, the gang as a whole, as well as the individual gang member, would lose respect. Indeed, a gang that allowed a member who had committed such a crime to remain within its ranks would be viewed as weak by other gangs. Therefore, the evidence that appellants were gang members was highly relevant to establish a motive for the offenses. “ ‘ “[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.” ’ ” (*Franklin, supra*, 248 Cal.App.4th at p. 953 [gang evidence admissible where prosecution’s theory was that

appellant's motive was to protect his status in the gang and strike back at the victim for disrespecting him and his gang].) Evidence explaining the unique gang perspective of the purported rumors was especially important here. Jurors would no doubt comprehend that anyone would be upset about such rumors. But the expert's testimony was essential to explain why a gang member's reaction would result not just in anger, but in the kidnapping, robbery, and assault that occurred here.

Moreover, the prejudicial impact of the evidence was limited. The parties stipulated that the Ligget Street Bloods and 4-Trey Gangster Crips were criminal street gangs within the meaning of section 186.22, obviating the need for the jury to hear evidence regarding the gangs' primary activities or pattern of criminal activity, including predicate offenses. (See *Hernandez, supra*, 33 Cal.4th at p. 1049 [recognizing that proof of predicate offenses may be unrelated to the crime and the defendant and may be unduly prejudicial].) The jury was given a limiting instruction regarding the gang evidence, advising that evidence about street gang activities and criminal acts could not be used to show the defendants' bad characters or criminal dispositions. The prosecutor admonished the jury, during argument, not to find defendants guilty simply because they were gang members. Finally, the fact the jury rejected the gang enhancements, rendering not true findings on each, conclusively demonstrates the gang evidence was not unduly prejudicial.

Accordingly, I would affirm Lee's convictions for robbery and kidnapping for robbery.

Concurring and dissenting:

EDMON, P. J.